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Supreme Court, U.S.
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No. 08-756

In The

Supreme Court of the United States

JOSE ALONSO COMPEAN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Introductory Preface

Petitioner Compean was a United States Border Patrol Agent on active duty at the border with Mexico along with other agents, when they became involved in a car chase with an illegal alien drug smuggler. The smuggler abandoned his speeding van full of marijuana and ran on foot toward the border. Compean had stationed himself in the path of the smuggler, who evaded capture after a brief scuffle. The smuggler claims he was just running for the border while Compean, who had dirt thrown in his eyes, believed the smuggler had turned back towards him with a possible weapon in his hand. Compean fired several shots, all missing. His co-defendant, Ignacio Ramos, fired once, striking the smuggler in the buttocks. He continued his flight and disappeared into Mexico.

Under a deficient, but un-objected-to set of instructions, the jury rejected Compean's defensive/justification theories and convicted him, *inter alia*, of assault with a dangerous weapon (18 U.S.C. § 113(a)(3)) and assault with serious bodily injury (18 U.S.C. § 113(a)(6)). The trial court then imposed the ten-year mandatory minimum sentence provided in 18 U.S.C. § 924(c)(1)(A)(iii) for the discharge of a firearm in relation to a crime of violence.

QUESTIONS PRESENTED – Continued

Question Presented Number I

Whether 18 U.S.C. § 924(c)(1)(A)(iii), establishing a ten-year mandatory minimum sentence for a defendant who discharges a firearm during a crime of violence, provides fair notice of its application to a law enforcement agent who discharges his weapon while on duty and in the course of attempting to stop and apprehend a dangerous fleeing felon who had attempted to avoid arrest by flight and who actively resisted arrest?

Question Presented Number II

Whether the balancing test mandated by the Court in *Graham v. Connor*, 490 U.S. 386 (1989) for determining the reasonableness of the use of force must integrate the fact that this was an illegal border entry by an illegal alien who entered the country strictly to smuggle drugs and was therefore not entitled to any Fourth Amendment protections, and who had attempted to avoid arrest by flight and actively resisting?

LIST OF PARTIES TO THE PROCEEDING

1. Jose Alonso Compean, Petitioner
2. Ignacio Ramos, Jr., Co-defendant/separately filing for Certiorari
3. United States of America, Respondent

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner Jose Alonso Compean respectfully asks for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Fifth Circuit decision, styled United States of America v. Ignacio Ramos and Jose Alonso Compean, is reported at 537 F.3d 439 (App. 1).[1]

STATEMENT OF THE BASIS FOR JURISDICTION

1. The decision of the Fifth Circuit was rendered July 28, 2008.

2. Petition for Rehearing and Petition for Rehearing En Banc were timely filed on August 18, 2008, after the Fifth Circuit, on August 5, 2008, granted an extension of time to file to that date.

[1] Petitioner Compean moved to adopt Appendix 1 filed by Ignacio Ramos with his Petition for Writ of Certiorari.

3. Petition for Rehearing and Petition for Rehearing En Banc were overruled September 10, 2008 (App. 2).[2]

4. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED IN THE CASE

1. Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. § 924(c)(1)(A):

> Except to the extent that a greater mini mum sentence is otherwise provided by this

[2] Petitioner Compean moved to adopt Appendix 2 filed by Ignacio Ramos with his Petition for Writ of Certiorari.

subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

STATEMENT OF THE CASE

This case involves the conduct of Jose Alonso Compean, Ignacio Ramos, Jr. and several other United States Border Patrol Agents on duty during a seventeen-minute span of time on the afternoon of February 17, 2005. In an area near the Mexican border notorious for drug smuggling, Compean observed and reported to other agents a suspicious van leaving at a high rate of speed. Another agent located

the van and began a pursuit, which Agent Ramos joined.

The van, driven by Osvaldo Aldrete-Davila, an illegal alien, was carrying approximately 750 pounds of marijuana. Davila eluded and evaded the pursuing Agents, and made his way towards the border. Alerted by radio to the progress of the chase, Compean positioned himself between the road and the border to intercept Davila.

Davila barely avoided crashing into a deep canal, then abandoned the van, and ran on foot up the steep bank directly at Compean. Davila thwarted Compean's attempts to apprehend him. In the process, Compean fell after an attempt to grab Davila, and got dirt in his eyes. According to Compean, but disputed by Davila, instead of simply fleeing toward the border, Davila slowed or stopped and turned back towards him, with something in his hand. Fearing the object was a weapon, Compean fired several times with his service weapon. Ramos, hearing those shots also fired one round, which, it was later learned, struck Davila in the buttocks. The trajectory of the bullet was consistent with Davila having turned slightly back towards the agents. As the agents watched, Davila escaped into Mexico.

It was the position of Compean at trial that he managed to get to his knees, with somewhat obstructed vision, and fired only because he thought Davila was a threat to him and fellow agents. He did not believe Davila had been hit by any of the shots, so

they did not report the weapons discharges to their superiors, as required by Border Patrol Procedures. No other agents on the scene did so either.

The United States District Court, Western District of Texas, El Paso Division, had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals jurisdiction was pursuant to 28 U.S.C. § 1291.

ARGUMENT ON QUESTION NUMBER I

This case presents an important question of law that has significant consequences for the approximately 900,000 federal, state, and local law enforcement officers in the United States. The application of 18 U.S.C. § 924(c) to the conduct of officers who fire their weapons in the line of duty at dangerous, unapprehended felons is wrong. Not only is such application overly broad and contrary to legislative intent, the statute gives no fair notice that it will be so applied. Moreover, established legal precedent gives no hint to law enforcement officers that such conduct would subject them to prosecution under this harsh law.

Officers know and understand that the law recognizes (1) they have a duty to act on apparent danger as well as actual danger, (2) they may be mistaken as to the necessity to use force without liability, (3) their actual intentions are irrelevant, (4) their actions will be judged solely from their perspective at the time they acted, (5) they are often required

to make split-second decisions in circumstances that are tense, uncertain, and rapidly evolving, and finally, (6) their actions will not be judged in the 20/20 vision of hindsight. In sum, officers are different, not in degree but in kind, from the "any persons" 924(c) purports to cover. Now 924(c) hangs like the Sword of Damocles over every law enforcement head.

Until this case there was never an application of 924(c) to situations where officers were trying apprehend an obviously dangerous, arrest-resisting felon. No officer would have had notice that shooting under such circumstances would so flaunt the clear dictates of the law as to expose them to the harsh sentencing factors of 924(c). The issue of how the statute should be interpreted and applied to armed officers in the line of duty should be settled by this Court.

An initial matter to be resolved is whether, as the Court of Appeals reminded many times, the verdict of the jury forecloses the issues raised in this Petition. That is to say, must controlling deference be given to the jury's "discernible resolution of disputed factual issues."[3] Not in this case, because the verdict is not necessarily a rejection of the defensive theories Compean and Ramos presented at trial.

The jury instructions, to which no trial objections were raised, failed to explain many salient parts of

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[3] *See, Jarrett v. Town of Yarmouth*, 331 F.3d 140, 147 (1st Cir. 2003).

the law relating to police use of force. Because these significant factors were not included in the court's charge, it is possible that the jury did not disbelieve the defendants, but felt they had to convict anyway.

The charge deficiencies were numerous and important. The jury was not instructed about the overarching precepts found in *Graham v. Connor*, 490 U.S. 386 (1989). Particularly, the charge failed to explain (1) that the reasonableness of a use of force must be judged from the perspective of the officer on the scene and, not in hindsight, (2) that the calculus of reasonableness must include that officers are often required to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving, and (3) that underlying intent or motivation is not relevant. *Id.*[4]

The jury was not told that an officer may be mistaken as to the need for force without liability. *Graham v. Connor, supra; Wagner v. Bay City, Texas*, 227 F.3d 316 (5th Cir. 2000); *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985). No instruction advised that an officer may respond to apparent danger to the same extent as to real danger, if his apprehension is reasonable under the circumstances, *Dyson v. State*, 672 S.W.2d 460 (Tex. Cr. App. 1984), or that the reasonableness must be examined solely from the

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[4] *And see*, Fifth Circuit Pattern Jury Instruction 10.2 (civil cases).

standpoint of the actor. *Ex Parte Drinkert*, 821 S.W.2d 953 (Tex. Cr. App. 1991).[5]

All these deficiencies and omissions can lead to the possible conclusion that the jury convicted because Davila was not an *actual* threat, even though believing that the agents really *thought* he was a threat. That plausible scenario means that the verdict does not represent an absolutely "discernible resolution" of disputed fact issues, *Jarrett, supra*, and thus does not foreclose the questions presented herein.[6]

Section 924(c), by its terms, applies to "any person who. . . ." However, a peace officer is not just "any person." He or she occupies a special place in society, with exceptional powers and duties to carry weapons, arrest, and use force. In that regard, a determination of what is reasonable to peace officers, as opposed to just "persons," must be gauged in the light of the "mosaic of legal rules" governing their conduct. *See*, *Iacobucci v. Boulter*, 193 F.3d 14, 21 (1st Cir. 1999); *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

Those legal rules cover a wide spectrum. To be sure, an officer cannot shoot an unarmed,

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[5] A federal officer is entitled to rely on state law defenses. *McElroy v. United States*, 861 F. Supp. 585 (W.D. Tex. 1994).

[6] The jury was even instructed, at one point, that it must decide whether the force used was reasonable or unreasonable (2R 437), a clear misplacing of the burden of proof.

non-dangerous fleeing suspect. *Tennessee v. Garner*, 471 U.S. 1 (1985). Those are not the simple facts of this case, however. Here it is undisputed that Davila was an illegal alien drug smuggler who evaded arrest in a high-speed chase, putting agents at risk of life and limb, and physically resisted arrest before fleeing. In other words, facing the agents was the very tense, uncertain, and rapidly-evolving scenario at the heart of the *Graham v. Connor* analysis of reasonableness, even if, but not conceded, Compean's apprehension that Davila turned with a possible weapon in his hand was rejected by the jury.

The "mosaic of legal rules" represents the universe in which peace officers live.[7] They are told they may use force, even mistakenly, if they reasonably believe it is necessary, that such use of force will be judged, not in hindsight, but solely from their standpoint and under the circumstances in which they decide to act, that the calculus of reasonableness must consider that they often have to make split-second decisions, *Graham v. Connor, supra*, and even that deadly force can be used to prevent an escape after the commission of an offense that involved possible serious physical harm,[8] *Tennessee v. Garner*, *supra*,

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[7] A "fact-bound morass." *Scott v. Harris*, 550 U.S. 372 (2007).

[8] The potentially deadly high-speed chase that Davila had just initiated, but was safely concluded, no thanks to him, could qualify. It is a felony in Texas. Penal Code § 38.04. Moreover, a vehicle can qualify as a "deadly weapon" itself. *See, e.g., Sullivan v. State*, 248 S.W.3d 746 (Tex. App. – Houston [1st] 2008).

whether or not other intentions or motivations are involved.

Additional parts to this "mosaic" only lessen the likelihood that Compean, or any officer, would know he faced a mandatory ten-year minimum sentence for firing his weapon. The legislative intent behind 924(c) was to persuade those intending to commit federal felonies to leave their guns at home. *Muscarello v. United States*, 524 U.S. 125 (1998). The statute was meant to cover armed peace officers only in the "extremely rare case" where "patently unlawful" core conduct is involved. *United States v. Rivera*, 889 F.2d 1029 (11th Cir. 1989); *United States v. Abod*, 770 F.2d 1293, 1297 (5th Cir. 1985) (citing *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952)).

Few cases deal with excessive force by officers resulting in the application of 924(c). In those found, there was "patently unlawful" conduct: shooting or assaulting a person who was already in custody and not resisting. *See*, *United States v. Williams*, 343 F.3d 423 (5th Cir. 2003); *United States v. Winters*, 105 F.3d 200 (5th Cir. 1997). These cases, also in the "mosaic," would not have given notice to Compean that shooting, even discounting his version, would implicate 924(c). Although relied upon as controlling by the Fifth Circuit below, those cases are so different factually that they do not truly apply and are

relevant to this discussion only in the sense that they add to the "mosaic of rules" about what not to do.[9]

What officers can glean from the case law, however, is that they will not be liable even if they create a situation making it more likely they will be mistaken as to the amount of force allowable. *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985). Considering that the border between reasonable and excessive force is already "hazy," *Saucier v. Katz*, 553 U.S. 194 (2001), requiring officers to *know* what is allowable, or risk 924(c) sanctions, is an unreasonable application of the law and creates a chilling effect on the exercise of their duties that society wants to avoid. *See*, *Brown v. Glossip*, 878 F.2d 871 (5th Cir. 1989).

A statute violates the Due Process Clause where its language does not convey a sufficiently definite warning as to the conduct it intends to cover, measured by common understanding and practice. *Roth v. United States*, 354 U.S. 476 (1957). The statute must give fair warning of the conduct it prohibits. *Bouie v. City of Columbia*, 378 U.S. 347 (1964). No person[10] may be held criminally responsible for conduct he could not reasonably understand would be proscribed.

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[9] The statute should be examined not just as written, but as construed. *United States v. Lanier*, 520 U.S. 259 (1997). To that end, courts should make comparisons with materially similar cases. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). There are none.

[10] In this case, "person" should be given the special meaning of "officer."

Lanzetta v. New Jersey, 306 U.S. 451 (1937); *Bouie, supra*. Even a statute not ambiguous on its face may still be vague and violative of due process in the manner of its application. *United States v. Spector*, 343 U.S. 169 (1952).

The application of 924(c) in this case requires that the special sort of person known as a peace officer must know that conduct is proscribed. All citizens, even peace officers, would know that using a firearm during a robbery, rape, or drug trafficking crime is proscribed conduct, as they would know that force cannot be used simply to beat or injure a non-violent, in-custody prisoner. No citizen would need to make a split-second decision to rob, or rape, or sell drugs. On-duty officers, on the other hand, must make decisions to use force on a daily basis, in trying circumstances, calculating in seconds what they may do within the broad and subjective "mosaic of legal rules" governing their actions.

As applied to peace officers, then, Section 924(c) is vague, or at least ambiguous, in its ambit. This calls into play the rule of lenity. *Rewis v. United States*, 401 U.S. 808 (1971); *United States v. Bass*, 404 U.S. 226 (1971). This ambiguity arises because peace officers are not "persons," but have a different "common understanding and practice"[11] than the general citizenry. Unlike the general citizenry, peace

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[11] *Roth v. United States, supra*.

officers must necessarily guess as to the meaning or reach of the statute, because of their special place in society, their training, and the "mosaic of legal rules" set out above. If the ambiguity cannot be resolved so that all officers everywhere will know where the do-not-cross line is, *Boyce Motor Lines, supra*, the doubts must be resolved in favor of the accused. *Rewis v. United States, supra*.

Because peace officers would not have fair notice that §924(c) would apply in circumstances like these, such application violates the Due Process Clause. Conviction thereunder cannot be allowed to stand. Otherwise there is a real risk that peace officers will be cast "loose at their peril on a vast uncharted sea." *Screws v. United States*, 325 U.S. 65, 97-98 (1945).

Petitioner Compean respectfully adopts and incorporates the arguments made by Ignacio Ramos, Jr., in his Petition for Writ of Certiorari.

ARGUMENT ON QUESTION NUMBER II

Petitioner Compean respectfully adopts and incorporates the arguments made by Ignacio Ramos, Jr., in his Petition for Writ of Certiorari. Question Number II presents the issue whether Davila's status as an illegal border entrant, whose sole purpose was drug trafficking, and who had no Fourth Amendment protections, swings the balancing factors of *Graham v. Connor, supra*, in favor of the reasonableness of the use of force in cases like this. Police use of force

issues are governed by and reviewed under the Fourth Amendment. *Graham v. Connor, supra.* If the person against whom that force is used has no Fourth Amendment rights, then as to him and for criminal prosecution purposes, police use of force violates no clearly-established federal right.

Compean suggests that Davila had no Fourth Amendment rights. He was illegally in the country, purely as a felony drug smuggler,[12] with no other connection to the United States sufficient to make him part of "the People." *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Courts have left for another day the question whether "an alien's connection with the United States is so tenuous that he cannot reasonably expect the protection of its constitutional guarantees. . . ." *Martinez-Aguero v. Gonzales*, 459 F.3d 618, 625 (5th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 837 (2006). Since another set of facts cannot be imagined showing a less tenuous connection with this country, perhaps this is that day.

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[12] While under a grant of Immunity from the Government, Davila continued his drug-smuggling ways, for which he was later sentenced to 9 ½ years. USA v. Osvaldo Aldrete-Davila, No. EP-07-CR-0671-KC, Western District of Texas, El Paso Division.

PRAYER

Jose Alonso Compean asks the Court to grant the writ, review the decision of the Fifth Circuit, and thereafter set aside his conviction and ten-year sentence.

Respectfully submitted,

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APPENDIX 1

(Opinion of the Fifth Circuit)

See Appendix 1 of
Petition for Writ of Certiorari
filed by Ignacio Ramos, Jr.

APPENDIX 2

(Order of the Fifth Circuit
denying rehearing)

See Appendix 2 of
Petition for Writ of Certiorari
filed by Ignacio Ramos, Jr.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners had fair notice that law-enforcement officers who unlawfully shoot a fleeing suspect are subject to prosecution under 18 U.S.C. 924(c), which prohibits the use (including discharge) of a firearm during and in relation to a crime of violence.

2. Whether the Fourth Amendment's reasonableness test for the use of force by law-enforcement officers should be modified to permit officers to shoot a fleeing suspect when the shooting takes place near an international border.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-60) is reported at 537 F.3d 439.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2008. A petition for rehearing was denied on

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix filed in No. 08-755.

September 10, 2008 (Pet. App. 61-62). The petitions for a writ of certiorari were filed on December 9, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner Ramos was convicted on one count of assault with a dangerous weapon, in violation of 18 U.S.C. 113(a)(3); one count of assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6); one count of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A); two counts of tampering with an official proceeding, in violation of 18 U.S.C. 1512(c); and one count of deprivation of rights under color of law, in violation of 18 U.S.C. 242. Petitioner Compean was convicted of the same offenses, and he was also convicted on two additional counts of tampering with an official proceeding. Ramos was sentenced to 132 months and one day of imprisonment, to be followed by three years of supervised release. Compean was sentenced to 144 months of imprisonment, to be followed by three years of supervised release. The court of appeals vacated the convictions for tampering with an official proceeding, affirmed the remaining convictions, and remanded for resentencing. Pet. App. 1-60; C.A. R.E. tabs 7, 8. The President later commuted petitioners' prison sentences. See p. 6, *infra*.

1. Petitioners were Border Patrol agents in Texas. Pet. App. 1. On February 17, 2005, they chased an alien drug smuggler who was driving a van toward the Mexican border. *Id.* at 1, 5. The smuggler, Oswaldo Aldrete-Davila, had crossed into the United States to re-

trieve a van that was carrying a large load of marijuana. *Id.* at 7. Aldrete-Davila reached the van, and when he was spotted, he decided to try to drive back to Mexico. *Ibid.* When the van became stuck at the edge of an irrigation ditch near the Rio Grande River, Aldrete-Davila abandoned it and ran toward the border while petitioners gave chase. *Id.* at 2, 7. Petitioners shot at Aldrete-Davila several times, hitting him once before he escaped into Mexico. *Id.* at 2.

After the shooting, petitioners and another Border Patrol agent gathered the ejected shell casings and threw them into an irrigation ditch. Pet. App. 10. In violation of Border Patrol policy, petitioners did not tell their supervisors that they had discharged their weapons. *Ibid.*

Several days later, another Border Patrol agent learned that Aldrete-Davila had been shot while attempting to flee from Border Patrol agents. Pet. App. 4-5. In exchange for immunity, Aldrete-Davila agreed to cooperate with the investigation of the shooting, and he returned to the United States so that the bullet could be removed from his body. *Id.* at 6. Tests of the bullet and of the firearms of all Border Patrol agents on duty in the area on February 17 revealed that the bullet came from Ramos's gun. *Ibid.* With that information, investigators were able to identify petitioners as the agents who had fired upon Aldrete-Davila. *Id.* at 6-7.

2. A federal grand jury in the Western District of Texas returned an indictment charging both petitioners with assault with intent to commit murder, in violation of 18 U.S.C. 113(a)(1); assault with a dangerous weapon, in violation of 18 U.S.C. 113(a)(3); assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6); discharging a firearm during and in relation to a crime

of violence, in violation of 18 U.S.C. 924(c)(1)(A); and deprivation of rights under color of law, in violation of 18 U.S.C. 242. Pet. App. 11 n.1. In addition, Ramos was charged with two counts of tampering with an official proceeding, in violation of 18 U.S.C. 1512, and Compean was charged with four counts of that offense. Pet. App. 11 n.1. Petitioners were tried by a jury.

Compean testified that Aldrete-Davila threw dirt as he fled, causing Compean to fall to the ground. Pet. App. 9. Compean said that he began firing when he saw Aldrete-Davila "turn with something in his hand, putting Compean in fear for his life." *Ibid.* Similarly, Ramos testified that he saw Compean "on the ground" and "saw Aldrete-Davila with something in his hand." *Ibid.* Ramos then fired a single shot. *Ibid.*

Aldrete-Davila offered a different version of events. He "denied turning around and denied having any object in his hand." Pet. App. 9. Instead, Aldrete-Davila "insisted that he simply ran towards the border, saw dirt being kicked up around him by bullets, and then fell, feeling a burning sensation in his left buttock." *Ibid.*

The jury found petitioners not guilty of assault with intent to commit murder but guilty of all other charges. Pet. App. 12. Because of their convictions for discharging a weapon during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A), petitioners were subject to a statutory minimum of ten years of imprisonment. The district court sentenced Ramos to 132 months and one day of imprisonment, to be followed by three years of supervised release. Pet. App. 12; C.A. R.E. tab 7. The court sentenced Compean to 144 months of imprisonment, to be followed by three years of supervised release. Pet. App. 12; C.A. R.E. tab 8.

3. The court of appeals affirmed in part, reversed and vacated in part, and remanded for resentencing. Pet. App. 1-60.

Petitioners argued that they "had no warning—either from the statutory language or from its previous application—that [18 U.S.C. 924(c)] could apply to law enforcement officers when carrying out their duties." Pet. App. 36. The court of appeals rejected that claim. *Id.* at 36-42. The court began its analysis by emphasizing that whether Section 924(c) "may be applied to officers otherwise acting lawfully in carrying out their duties" was not the question before it. *Id.* at 36. In light of the jury's verdict, the court could not assume that petitioners "acted in self-defense or for the safety of others." *Ibid.* To the contrary, the verdict compelled the court to assume that petitioners "shot at, and wounded, Aldrete-Davila without lawful justification," because the jury "rejected [petitioners'] versions of the facts." *Id.* at 36-37.

The court of appeals held that petitioners "cannot advance a persuasive textual argument supporting their fair warning claim," because Section 924(c)(1)(A) "is applicable to 'any person' and contains no language that law enforcement officers are excepted from its application." Pet. App. 39. The court noted that its precedents "permitted application of § 924(c)(1)(A) to police officers." *Id.* at 40 (citing cases). In addition, the court reasoned that "there is no question but that a police officer's unjustifiable shooting of a victim qualifies as a crime of violence" and "that a police officer's shooting a victim who poses no physical threat to the safety of the officer or the public is unjustifiable." *Id.* at 39.

In response to petitioners' argument that Aldrete-Davila "posed a specific threat" to petitioners' safety,

the court of appeals again observed that "this view of the facts was rejected by the jury." Pet. App. 40. Citing *Tennessee* v. *Garner*, 471 U.S. 1 (1985), the court explained that the conduct for which petitioners were convicted "violates the Fourth Amendment rights of the fleeing felon if he poses no physical threat to the officers or danger to others." Pet. App. 42. Thus, the court concluded that petitioners "were denied no right of due process for lack of notice that § 924(c) could be applied to police officers while performing law enforcement duties." *Id.* at 59.

The court of appeals determined that the Border Patrol's investigation of the shooting was not an "official proceeding" within the meaning of 18 U.S.C. 1512(c), and it therefore vacated petitioners' convictions for tampering with an official proceeding. Pet. App. 46-55. The court rejected a number of other claims not reasserted here and remanded for resentencing. *Id.* at 60.

4. On January 19, 2009, President Bush commuted petitioners' sentences. Under the commutations, each petitioner's prison sentence will expire on March 20, 2009.[2]

ARGUMENT

Petitioners contend (Pet. 12-37; 08-756 Pet. 5-14) that they lacked warning that 18 U.S.C. 924(c) could be applied to law-enforcement officers performing their duties and that the Court should modify the Fourth Amendment's reasonableness test governing the use of force by the police in the context of law enforcement at the border. The court of appeals correctly rejected

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[2] U.S. Dep't of Justice, *President George W. Bush Grants Commutations* (Jan. 19, 2009) <http://www.usdoj.gov/opa/pr/2009/January/09-opa-053.html>.

those claims, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners renew their claim (Pet. 12-26; 08-756 Pet. 5-13) that Section 924(c) does not provide fair warning that the statute applies to "on duty law enforcement officers attempting to apprehend fleeing felons who actively resist arrest." Pet. 12. That argument lacks merit. Section 924(c) applies to "*any* person" who uses or carries a firearm "during and in relation to *any* crime of violence."[3] 18 U.S.C. 924(c)(1)(A) (emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary of the English Language* 97 (1976)). As the court of appeals explained, the statutory language and controlling case law leave no doubt that Section 924(c) can apply, and has previously been applied, to law-enforcement officers. Pet. App. 36-42. Petitioners rely (Pet. 22) on the legislative history, but they concede that it "clearly supports a conclusion that anyone licensed to carry a gun, including a police officer, could be subject to prosecution" under Section 924(c).

Petitioners acknowledge (Pet. 14) that "a number of cases from various Courts of Appeals have upheld the application of [Section] 924(c) to on duty police officers," and they cite no court of appeals case taking a contrary position. Instead, they assert (Pet. 15) that their case is factually distinguishable from those that have applied Section 924(c) to law-enforcement officers, because it

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[3] In this case, the indictment charged that petitioners discharged a firearm, which is a form of "use." Pet. App. 43-44; *Bailey* v. *United States*, 516 U.S. 137, 148 (1995).

involved on-duty agents who were "attempting to apprehend a fleeing felon who had actively resisted arrest and led the agents on a high speed chase." Pet. 15. But the Due Process Clause does not limit the application of criminal statutes only to factual scenarios identical to those that courts have already addressed. The test is one of "reasonable warning," *United States* v. *Lanier*, 520 U.S. 259, 269 (1997), which can come from the statute "standing alone," *id.* at 267. And in any event, the court of appeals concluded that prior cases applying Section 924(c) to law-enforcement officers "appear to encompass the circumstances of this case." Pet. App. 41. Petitioners' factbound challenge to that determination does not warrant this Court's review.

2. Petitioners further contend (Pet. 26-37; 08-756 Pet. 13-14) that the "reasonableness" test for evaluating claims that officers used excessive force in violation of the Fourth Amendment should be "modified" to excuse their conduct in the factual scenario of law enforcement at the border. No such modification is necessary: the applicable test already takes the totality of the circumstances into account. This Court held in *Graham* v. *Connor*, 490 U.S. 386 (1989), that "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. And in *Tennessee* v. *Garner*, 471 U.S. 1 (1985), the Court held that it is not reasonable under the Fourth Amendment for an officer to shoot a fleeing felon who poses no threat to the officers or danger to others. There is no basis for departing from those standards in this case.

Petitioners emphasize (Pet. 30) that their victim was an illegal alien near a border, and they cite *United States* v. *Flores-Montano*, 541 U.S. 149 (2004), in support of their argument that "the powers of law enforcement officers in connection with international border detentions and searches are broader than otherwise." But although *Flores-Montano* recognized that "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border," *id.* at 152, the holding of that case does not assist petitioners. The Court in *Flores-Montano* concluded "that the Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank." *Id.* at 155. Nothing in *Flores-Montano* suggests that an officer may shoot an unarmed suspect who poses no threat to his safety or that of the public simply because the shooting takes place near a border.

Petitioners also cite *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), but their reliance on that case (08-756 Pet. 14) is similarly misplaced. In *Verdugo-Urquidez*, this Court held that the Fourth Amendment does not apply "to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." 494 U.S. at 261. Petitioners' conduct, however, occurred within the United States. And while it is true that aliens "receive constitutional protections when they have come within the territory of the United States and developed *substantial* connections with this country," *id.* at 271 (emphasis added), this Court has never suggested that ordinary reasonableness standards are inapplicable to the use of force against illegal aliens briefly present in the United States.

Moreover, short of a rule under which officers may always shoot suspected felons at the border, it is doubtful whether any modification of the reasonableness standard would excuse petitioners' conduct in this case. As the court of appeals emphasized, petitioners "presented a much different version of the facts from that presented by the government," but "[t]he jury did not believe the Border Patrol agents." Pet. App. 2-3. By finding petitioners guilty, the jury implicitly rejected their claim (Pet. i) that Aldrete-Davila was "actively resisting arrest." Instead, it found that he "posed no physical threat to either officer." Pet. App. 2. Indeed, petitioners acknowledge (Pet. 35) that their claim is essentially one of "insufficient evidence," a claim that the court of appeals correctly rejected and that does not warrant this Court's review in any event.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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